

THE UNITED STATES OF AMERICA  
COUNTY OF [ ] STATE OF [ ]  
[ ]

THE STATE OF TEXAS, Defendant in Error

IN REPLY TO THE VERDICT OF JURY IN THE  
SECOND SUPPLEMENTAL JUDICIAL DISTRICT OF TEXAS

SUPPLEMENTAL WRIT FOR HABEAS CORPUS  
[ ]

H. H. [ ]

Attorney General

Counsel for the State of Texas, Defendant in Error

IN THE  
**Supreme Court of the United States.**

**OCTOBER TERM, 1897.**

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*No. 406.*

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THE HOUSTON AND TEXAS CENTRAL RAILWAY  
COMPANY, FREDERICK P. OLCOTT, ET AL., PLAIN-  
TIFFS IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

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IN ERROR IN THE COURT OF SPECIAL APPEALS FOR THE  
SECOND SUPREME JUDICIAL DISTRICT OF TEXAS.

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**SUPPLEMENTAL BRIEF FOR DEFENDANT IN  
ERROR.**

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I beg to submit the following in reply to the brief filed  
in behalf of the plaintiff in error:

The suit is for land claimed by plaintiff in error as a  
donation for constructing a branch road from Brenham,  
Texas, to Austin, Texas.

The case will be better understood by referring to a few

sections of the several acts of the Texas legislature upon which the railroad company bases its right to the land in controversy.

The Houston and Texas Central railway has not always existed under that name. It was first chartered under the name of the Galveston and Red River Railroad Company. This occurred in 1848. (See Appendix to Brief of Plaintiff in Error, pages 1 to 6, inclusive.) It is worthy of note that by the terms of the charter no land was granted to the railroad company. This charter, thus granted by special act of the legislature, was amended by another special act, the terms of which were accepted on February 14, 1852. (See Appendix to Brief of Plaintiff in Error, pages 6 to 13, inclusive.)

Section 14 of the act last named granted to the Galveston and Red River Railroad Company eight sections of land of six hundred and forty acres each for every mile of railroad actually completed by them and ready for use, etc. It further provided that certificates should be issued for the road thus completed, and added: "Such certificates shall be for six hundred and forty acres each and shall be located upon any unappropriated public domain in the State of Texas within twelve months thereof, which date shall appear upon the face of each certificate." (See Appendix to Brief of Plaintiff in Error, page 15.)

On February 7, 1853, the Texas legislature authorized the Galveston and Red River Railroad Company to build a branch road "towards the city of Austin," the authority being granted, among other things, in the following language:

"SECTION 2. The said company is further authorized to extend said railroad to the city of Galveston, and also to make and construct, simultaneously with the amount of railroad stipulated in the original acts establishing said company, a branch thereto toward the city of Austin under the restrictions and stipulations of said acts and subject to the right of said State to regulate the tolls by general law."

The record does not disclose that this special act was at any time accepted by the railroad; it is not shown that it so ever extended its line to the city of Galveston, and, indeed, it has not done so, nor is it shown that it attempted to extend the road "toward the city of Austin" until 1870, and thereafter by virtue of more specific legislative authority. But it is wholly immaterial whether the road in question was constructed by virtue of the act of 1853 or of 1870; no land was granted by either act. As a matter of fact, however, the road was not built by authority of the act of 1853, but by authority of the act of 1870. (*H. & T. C. vs. Tex.*, 40 S. W. Rep., 402, 403.)

On January 30, 1854, the Texas legislature passed a general law granting to railroads then in existence sixteen sections of land for every mile of road that should be constructed and put in running order, upon certain conditions therein stated, but not necessary now to discuss. Section 12 of that act, in so far as applicable, is in the following language:

"That the provisions of this act shall not extend to any company receiving from the State a grant of more than sixteen sections of land, nor to any company for more than a single track road with necessary turnouts, and any company now entitled by law to receive the grant of eight sections of land per mile for the construction of any road, accepting the provisions of this act, shall not be entitled to

receive any grant of land for any branch road. *Provided*, This act shall not be so construed as to give any company now entitled by law to receive eight sections of land more than eight additional sections.

\* \* \* \* \*

*And further provided*, That the certificates for land issued under the provisions of this act shall not be located upon any land surveyed or titled previous to the passage of this act. *And further provided*, That this act shall continue in force for the term of ten years from the time it shall take effect and no longer." (Appendix to Brief of Plaintiff in Error, pages 28 and 29.)

On January 23, 1856, the Texas legislature passed an act for the relief of the Galveston and Red River railroad, the terms of which the said railroad accepted. Section 6 of that act reads as follows:

"SECTION 6. That nothing in this act shall be so construed as to affect the right of the State to repeal or modify the act of January 30th, 1854, entitled An act to encourage the construction of railroads in the State of Texas by donations of land; *Provided*, That the right to lands acquired before said repeal or modifications shall in all cases be protected." (See Appendix to Brief of Plaintiff in Error, page 35.)

From the foregoing it is plain—too plain for argument, indeed—that the act of 1854, under which the land in controversy is claimed, undertook to grant lands, or, in other words, promised lands for the construction of main lines only, branch lines being specifically excluded from the benefits of the act. It becomes, therefore, immaterial to inquire whether the road from Brenham to Austin, for which these lands were claimed, was constructed under the authority of

the act of 1853 or not, because the act of 1854 did not give any land for the construction of branches, but only for the main lines. Let it be conceded, for argument's sake, that it had the right to build this line of road under the terms of the act of 1853, and that it was built by authority of that act. Its rights in this case would remain unchanged. It would have the naked privilege of building the road, but could claim no donations of land therefor, and inasmuch as its right to construct and operate the road is not contested, it is immaterial whether the right was granted by the act of 1853 or by some other act; but it is insisted in the brief of the plaintiff in error, herewith filed, that because of the right to construct this road it had the right to the lands secured by general law.

Counsel for plaintiff in error forget that the general law gave no land for the construction of branch lines. Had they based their claim for land on the charter as amended, which gave eight sections per mile, their contention would not be so flagrantly wrong; but they have elected to claim under the general statute passed in 1854 and the acts amendatory thereof (Rec., p. 16). Moreover, they are claiming sixteen sections of land per mile, while the amended charter gave them only eight. They cannot claim under both. The language of the act of 1854 makes that impossible. Claiming under the general law of 1854, the plaintiff in error is bound by its terms. It having provided that no railroad company then authorized to receive *eight sections of land per mile should be entitled to receive any lands for any branch road*, and it being true that plaintiff in error was entitled by the terms of its amended charter to receive

eight sections per mile, it cannot receive any land for the construction of the *branch line in question*.

By the terms of the special act of 1856 above cited relief was extended by the State of Texas to the Galveston and Red River Railroad Company. In passing that act the legislature reserved the right to repeal or modify the land-grant act of 1854, upon which the claims of plaintiffs in error are based. The rights of the railroad company to land acquired *before the passage* of the repealing act were to be protected. The terms of that act were accepted by the railroad company along with the relief which it carried. This court has often announced the rule that the Government may withdraw an offer made in a general statute at any time before its acceptance. This rule is fortified in this case by the contract above mentioned, as set out in the special act of 1856. It seems clear, therefore, that the State of Texas had the right to repeal the act of 1854 by the constitution of 1869. The railroad company had no right to complain, so long as its rights to land *theretofore acquired* should be respected. Inasmuch as the lands herein involved were acquired after the repeal of the act of 1854, the right of the State to recover them should be admitted.

On the 2nd of February, 1856, the State of Texas, by a special act, incorporated the Washington County Railroad Company. (See Appendix to Brief of Plaintiff in Error, pages 36 to 45, inclusive.) This company was subsequently merged into the Houston and Texas Central Railroad Company. Section 14 of the act of incorporation of the Washington County Railroad Company is as follows:

"SECTION 14. That this company shall be subject to the provisions and be entitled to the benefits of any general

laws which have been or may be enacted by the State rewarding and encouraging the construction of railroads, and that this act take effect from its passage."

It will, therefore, be noted that the Washington County Railroad Companies' claim to lands was also based upon the general act of 1854 and laws amendatory thereof. There was no land grant in its charter, and, therefore, no contract with the State until such time as the terms of the general law should have been accepted by the completion of stated sections of its road. In 1856 the Galveston and Red River Railroad Company's charter was so amended as to authorize the change of its name to that of the Houston and Texas Central Railroad Company. (See Appendix to Brief of Plaintiff in Error, pages 46 to 48.) From that date until the present, that road has been recognized as a part of the Houston and Texas Central Railway Company. In 1888 or 1889, its name was changed to the Houston and Texas Central Railroad Company, but this last fact is immaterial in this case.

On February 4, 1858, the Texas legislature passed a special act for the relief of the Houston and Texas Central Railway Company, exempting it from certain forfeitures and penalties which it had incurred, but requiring it to complete the other sections of its road within the time therein stated. Section 2 of this act, however, contained the following provision: "*Provided, That the benefits of the provisions of any general law shall only inure to the said railroad company whilst said law shall remain in force*"—(See Appendix to Brief of Plaintiff in Error, page 50)—accepting the terms of this act.

The Houston and Texas Central Railway Company was

bound by its terms. This it twice stipulated in clear and unambiguous language that the State should have the right to repeal the general law under which it claims its lands, and that the railroad company shall receive no benefit from that general law after its repeal by the State. The rights of the State then were secured.

First. By the general provision that the State might at any time repeal the general law which confers bounty on the railroad company. (*Salt Company vs. East Saginaw*, 13th Wallace, 373, 376.)

Second. By the contract solemnly entered into by the State and the railroad company that the right thus mentioned was reserved. This was secured by the act last mentioned as well as by the terms of the special act of 1856, heretofore cited.

The act of 1861 recognized this fact. (See Appendix to Brief of Plaintiff in Error, page 51.) This fact is also shown by the act for the relief of railroads, passed in 1862, the first section of which reads as follows :

“The failure of any chartered railroad company of this State to complete the sections or construct the sections of its road under the existing laws shall not operate as a forfeiture of its charter or of the lands to which said company shall be entitled under the provisions of the act entitled An act to encourage the construction of railroads in the State of Texas, under the acts of 1854 and the subsequent acts supplementary thereto.”

Section 4 of the act required the Houston and Texas Central Railroad Company to restore certain of its stockholders be-

fore it could accept the benefits of the act of 1854. The act of 1854 was extended in its terms for the period of ten years by the act of 1866. The special act of the legislature, as incorporated in the brief of the plaintiff in error, passed in 1866, the plaintiff in error did not rely upon in the court below. Though a special act, it was not pleaded, and, indeed, if it had been pleaded, it would not affect the rights of the parties.

An examination of the act of 1866 will show that it granted land to the Houston and Texas Central Railway Company, but with this limitation: And said railroad company shall construct their road on the line heretofore prescribed by the act for the Houston and Texas Central Railway Company, approved February 8, 1861 (Appendix to Brief of Plaintiff in Error, page LXI). The line prescribed by the act of 1861 was the main line and not the Austin branch. (Act of 1861, Appendix to Brief of Plaintiff in Error, pages LI and LII.)

There is nothing said about a branch line to Austin; indeed, it was not contemplated at that time, because the consolidation with the Washington County Railroad Company had not been accomplished.

The question was asked: What was the necessity of the act of 1866 if it had only repeated the language of the general law passed in the same year? A re-examination of the two acts leads me to this conclusion: That the general law of 1866 contained a provision which I had overlooked and to which attention was not called in the brief by the counsel for the plaintiff in error. The latter part of section 4 of the general act reads as follows: *Provided*, That all tap roads

over 25 miles long shall be entitled to the benefits of this act. (Appendix to Brief of Plaintiff in Error, page LXII.)

The singular part of this provision is that the original act of 1854, which it sought to extend for a period of ten years, expressly excluded branch roads from any benefits thereunder. I assume, therefore, that when the special act of 1866 was passed it sought to clear up any confusion produced by the words of the general law to the effect that the words "tap roads more than 25 miles long" might include branch roads. Therefore the special law of 1866 referred to the Houston and Texas Central Railway Company and limited its land grant in express terms to the line which was therein specifically named. This was the main line and not the Austin branch. This makes clear the fact that, whatever may be said as to the rights of other roads, the Houston and Texas Central should get nothing for branches or "tap roads."

In so far as the ordinance adopted by the constitutional convention of 1868 is involved, it is sufficient to say that it was never ratified by vote of the people. This fact was overlooked by the supreme court of Texas in the several cases cited in the brief of the plaintiff in error; but in a recent case the supreme court has announced the rule that the ordinances in question, never having been ratified by the people of Texas, are no part of the constitution of the State, are inoperative and void. (*Quinlan vs. The H. & T. C. R'y*, 89th Tex., 356, 376.)

It is insisted, however, that this ordinance was ratified by the legislature of 1870. The answer to this is, first, that the act of the legislature of 1870 does not purport to be a revision of the constitutional amendment, but is an independent

act, not reaching back, but "only operative prospectively from the date of its passage;" second, the legislature was without power to ratify the ordinance, to validate which the vote of the people was necessary. This is so plain that it is not deemed necessary to elaborate further than to say that the legislature can never validate an act which it was powerless to authorize. The legislature did not have power to authorize the adoption of this ordinance as a part of the constitution, and therefore it could not ratify it afterwards. (*Quinlan vs. H. & T. C. R'y*, 89th Tex., 356, 376.)

This much has been said by way of argument and statement to show that the land certificates issued and located on the land in question were unauthorized by law, and therefore void. In addition to this, however, the act authorizing the issuance of certificates to be donated to the railroads required them to be located on lands not otherwise appropriated. To this point attention was called in the brief filed herein. Indeed, it has been adjudicated between the State of Texas and the Houston and Texas Central Railway Company that the certificates in this case are located in the same territory and were improperly located, in that the lands sought to be thereby appropriated had been reserved from location for the use of the Texas and Pacific railroad. (See Record, page 31, section 24; *Jumbo Cattle Company vs. Bacon & Graves*, 79th Tex., 11.)

It is therefore respectfully submitted that the following propositions, based upon the statements herein made, fairly state the law of this case:

1st. That the Galveston and Red River Railroad Company and its successor, the Houston and Texas Central

Railway Company, as well as the Washington County Railroad Company, which was merged in the Houston and Texas Central Railway Company, were not entitled to any lands for the construction of their roads by the terms of their charter, save and except the Galveston and Red River Railroad Company, which was entitled to eight sections of land per mile.

2d. That the Galveston and Red River Railroad Company and the Houston and Texas Central Railway Company accepted donations of land under the general act of 1854, in lieu of the amount promised in their amended charter, and that the lands herein claimed were received by them by virtue of the general law only, and that the general law, in express terms, forbade the granting of land for any branch road; that the road from Brenham to Austin is a branch road, the main line extending northward to Red river, and that therefore, under the terms of the act of 1854, they were not entitled to any land for the construction of said branch.

3d. That the State of Texas in the several relief acts which were accepted by the Houston and Texas Central Railway Company stipulated with said company that it should have the right to modify or repeal the act of 1854 whenever it chose, and that after such repeal no lands should be granted to the railroad company other than those acquired previous to said repeal.

4th. That the special acts and ordinances set out in the brief of the plaintiff in error do not give nor pretend to give to the railroad company any lands for the construction of

branch roads, and therefore they are irrelevant and immaterial. If any right was thereby secured to plaintiff in error, it was the naked privilege of building the branch road in question without a land grant.

5th. That inasmuch as the land grants herein claimed by the brief of the plaintiff in error are based upon a general law, the State had the right, inherent in itself as well as by the contract above mentioned, to repeal that law at any time it chose; and having exercised that right and repealed the law, the lands in question having been thereafter acquired, were obtained without authority of law, and the State is entitled to reclaim them.

6th. That all of the lands herein claimed have been located not later than 1874 (see Record, subdivision 12, page 19). The amendment to the State constitution adopted in 1873 is immaterial, because it is not self-executing and was not executed by act of the legislature until 1876, after the acquisition of the land in question.

It is therefore respectfully submitted that the case should be affirmed.

(Signed)

M. M. CRANE,

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